83-1331

NO.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

LAMAR BARCLAY PINE, SR. and SHIRLENE TUCKER PINE, Debtors; and MELVIN GILES and WANDA GILES, Debtors; Petitioners

V.

CREDITHRIFT OF AMERICA, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether debtors under the Bankruptcy Code may avoid nonpossessory, non-purchase-money security interests in household goods pursuant to 11 U.S.C. § 522(f) when the state of their residence has opted out of the federal exemptions provided in 11 U.S.C. § 522 (d) and has enacted state exemptions which are limited to the debtors' equitable interest in household goods?

2. Whether Georgia's exemption statute limits Georgia residents to an exemption of only the debtors' equitable interest in household goods.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

NO.

LAMAR BARCLAY PINE, SR. and SHIRLENE TUCKER PINE, Debtors and MELVIN GILES and WANDA GILES, Debtors; Petitioners

V.

CREDITHRIFT OF AMERICA, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The petitioners, Lamar and Shirlene Pine and Melvin and Wanda Giles, respectfully pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 717 F. 2d 281. It is

reproduced in Appendix A to this Petition. The opinions of the District Court are reported at 18 B.R. 711 (E.D. Tenn., 1982) in In Re Pine, and at 18 B.R. 708 (E.D. Tenn., 1982) in In Re Giles, and both opinions are reproduced in Appendix B to this Petition. The opinion of the Bankruptcy Court in In Re Pine is reported at 11 B.R. 595 (Bankr. E.D. Tenn., 1981). The opinion of the Bankruptcy Court in In Re Giles was not reported. Both opinions are reproduced in Appendix C to this Petition.

JURISDICTION

The judgment of the Court of Appeals (App. A. pp. 2A-8A) was entered on September 7, 1983. A timely petition for rehearing or rehearing en banc was denied on November 14, 1983. (App. A, p. 9A.) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The federal statutory provisions involved in this case are 11 U.S.C. § 522 (b), 11 U.S.C. § 522(d), and 11 U.S.C. § 522(f) which are set out in Appendix D to this Petition.

2. The state statutory provisions involved in this case are TENN. CODE ANN. § 26-2-102, TENN. CODE ANN. § 26-2-112, and GA. CODE ANN. § 51-1301.1(a) which are set out in Appendix D to this Petition.

STATEMENT

The Pines and the Gileses each filed voluntary bankruptcy petitions in the Eastern District of Tennessee, Southern Division, under Chapter 7 of the Bankruptcy Code. The Pines and the Gileses listed Credithrift of America, Inc. (hereinafter "Credithrift") as a secured creditor and Credithrift filed a claim in

each case claiming a nonpossessory, non-purchase-money security interest in certain household goods owned by the petitioners.

On November 19, 1980, the Gileses filed a complaint against Credithrift pursuant to 11 U.S.C. § 522(f) in order to avoid Credithrift's lien on their household goods. The Gileses listed these household goods as exempt under Georgia law. At all times relevant hereto, the Gileses lived in Georgia. On February 6, 1981, the Pines filed a complaint against Credithrift pursuant to 11 U.S.C. § 522 (f) in order to avoid Credithrift's lien on their household goods. The Pines listed these household goods as exempt under Tennessee law. At all times relevant hereto, the Pines resided in Tennessee.

After an extensive review of the legislative history of § 522 and the Congressional intent manifested in § 522

(f), the Bankruptcy Court held in both cases that the debtors were entitled to avoid Credithrift's lien and to claim their household goods as exempt. (App. C, pp. 50A, 92A). Credithrift perfected an appeal to the District Court in both of these cases. In affirming the Bankruptcy Court in both cases, the District Court held that, by avoiding liens, § 522(f) operated to allow an exemption of property which would have been exempt under § 522 (b) if the liens never had existed. (App. B, pp. 19A, 30A).

Credithrift then appealed both cases to the United States Court of Appeals for the Sixth Circuit which consolidated the cases. The Court of Appeals held that both Tennessee and Georgia had opted out of the federal exemption scheme and had provided that their residents could only exempt their equity interest in property. (App. A, pp. 5A-6A). The Court went on to

hold that debtors could avoid liens only on property that the states had declared to be exempt. According to the Court, since Georgia and Tennessee allowed only the debtors' equity to be exempt, the debtors' property subject to Credithrift's lien could not be exempted and Credithrift's lien could not be avoided.

REASONS FOR GRANTING THE PETITION

1. The Decision By The Court of Appeals Is In Direct Conflict With The Decision Of Another Circuit Court Of Appeals.

The Court of Appeals, in construing Georgia law, held that a Georgia resident may only claim an equity interest in household goods as exempt. The Court of Appeals then went on to hold that debtors may not avoid liens in household goods in states which limit the exemptions available to their residents to the debtors' equity interest in goods. These holdings are in

direct conflict with the decision of the United States Court of Appeals for the Eleventh Circuit in In Re Maddox, 713 F. 2d 1526 (C.A. 11, 1983). That Court, construing the same Georgia and United States statutes in question here, rejected the argument that Georgia has limited its residents' exemption to solely their equity interest in property or in any way limited its residents' ability to avoid a security interest pursuant to 11 U.S.C. § 522(f).

The Georgia exemption statute, in pertinent part, provides that Georgia residents may exempt "The debtor's interest, not to exceed $200 in value in any particular item, in household furnishings, household goods. . . ." GA. CODE ANN. § 51-1301.1 (a)(4). In all essential respects, this wording is the same as the wording employed by Congress in the federal exemption scheme provided in 11

U.S.C. § 522(d). Nothing in the Georgia statute purports to limit the available exemption to the debtors' equity interest.

The opinion of the Eleventh Circuit in Maddox, supra. also challenges the notion that a state may frustrate the provisions of § 522(f) by limiting the exemptions available to its residents. The Court rejected the decision of a split panel of the Fifth Circuit in Matter of McManus, 681 F. 2d 353 (C.A. 5, 1982), a decision heavily relied upon by the Court of Appeals in this case.

2. The Court Of Appeals Misconstrued 11 U.S.C. § 522(f).

11 U.S.C. § 522(f) provides that a debtor may avoid a nonpossessory, nonpurchase money lien on household goods only "to the extent that the lien impairs an exemption to which the debtor would have been entitled under [§ 522(b)]." The Court of Appeals interpreted § 522(f) to

require that household goods must already be exempt under § 522(b) before a debtor may utilize § 522(f) to avoid a lien on those goods.

In the absence of Credithrift's security interest, the Pines could have claimed their household goods as exempt under 11 U.S.C. § 522(b), pursuant to Tennessee law. TENN. CODE ANN. § 26-2-102. The Gileses would have been able to exempt their household goods under 11 U.S.C. § 522(b), if Credithrift had no security interest, as long as they met the dollar limits of the Georgia statute. GA. CODE ANN. § 51-1301.1(a)(4).

The only impairment to either the Pines' or the Gileses' claim of exemption under § 522(b) is Credithrift's security interest. In other words, Credithrift's security interest impairs an exemption to which both the Pines and the Gileses would have been entitled under § 522(b) in the

absence of any security interest. If they could exempt their household goods under § 522(b) without regard to Credithrift's security interest, neither the Pines nor the Gileses would have needed to utilize § 522(f). Furthermore, if Credithrift's security interest did not impair their ability to claim their household goods as exempt, neither the Pines nor the Gileses would have met the statutory prerequisite in § 522(f) that the lien must impair an exemption to which the debtors would have been entitled under § 522(b).

As Judge Wilson pointed out in the memorandum decisions in both of these cases at the District Court level (App. B, p. 19A and p. 29A), the effect of § 522(f) is to create an equity interest in the debtors. By avoiding liens, § 522(f) allows property to be exempted that <u>would have been</u> exempted under § 522(b)

if the liens did not exist.

The wording of § 522(f) clearly assumes that the goods subject to the security interest are not already exempt under § 522(b). By reaching an opposite construction of the statute, the Court of Appeals has created a circular "Catch-22" world in which § 522(f) is rendered meaningless.

3. The Rationale Adopted By The Court Of Appeals Would Affect Thousands of Bankruptcy Cases.

The decision of the Court of Appeals for the Sixth Circuit construes only Tennessee and Georgia law with respect to § 522(f) of the Bankruptcy Code. However, the rationale adopted by the Sixth Circuit could have an impact on thousands of bankruptcy cases filed each year throughout

the United States.[1] 29 States have opted out of the federal exemption scheme provided in 11 U.S.C. § 522(d). Many of those states have statutes which limit debtors to exemption of their equity interests in household goods. According to the Sixth Circuit, debtors in those states would not be able to avail themselves of the rights provided in § 522(f). Furthermore, since the Georgia exemption statute is worded in substantially the same manner as the federal exemption scheme, § 522(f) would not be available to debtors living in the 21 states which have not opted out of the

---

[1] According to the Administrative Office of the U.S. Courts, Statistical Analysis and Reports Division, a total of 8,839 motions to liens, pursuant to 11 U.S.C. § 522(f) and Bankruptcy Rule 4003(d), were filed throughout the United States between August 1, 1983, and December 31, 1983. Prior to August 1, 1983, liens were avoided by adversary complaint. No figures are available for the numbers of lien avoidance complaints prior to August 1, 1983.

federal exemptions. Finally, there are a few states that allow debtors to exempt household goods even though they are covered by a security interest. However, debtors in those states could not utilize § 522(f) because the lien does not impair the debtors' ability to claim those goods as exempt. Thus, under the rationale adopted by the Court of Appeals, § 522(f) would not be applicable in any state. This result violates the cardinal rule of construction that a statute should be interpreted in a manner that gives effect to all of its provisions and is consistent with legislative intent. Administrator, F.A.A. v. Robertson, 422 U.S. 255 (1975); Weinberger v. Hynson, Westcoff & Dunning, Inc., 412 U.S. 609 (1973).

4. The Ruling Of The Court Of Appeals Would Frustrate The Intent Of Congress In Enacting § 522(f).

Although certain provisions of § 522 were the result of last minute negotiation and compromise, the provisions of § 522(f) have remained essentially unchanged from the initial report of the Commission on Bankruptcy Laws through both the House and Senate to the final provision that was enacted. The rationale behind that section, as expressed by the Commission on Bankruptcy Laws of the United States in their report to Congress, the United States House of Representatives, and the United States Senate, was to further the policy of providing a debtor with a fresh start by allowing the debtor to nullify certain types of liens and to exempt the property that served as collateral. Report of the Commission on Bankruptcy Laws of the United States, H. R. Doc. No. 93-137, 93rd Cong., 1st Sess., Part II, p. 130; Report of the Committee on the Judiciary, House of Representatives,

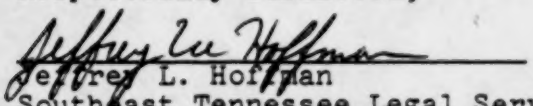
H.R. Rep. No. 95-595, 95th Cong., 1st Sess., p. 127; Report of the Committee on the Judiciary, United States Senate, S. Rep. No. 95-989, 95th Cong., 2d Sess., p. 76.

By its own admission, the Court of Appeals ignored the Congressional intent behind § 522(f) and subordinated the legislative policy objectives to what the Court mistakenly interpreted to be the plain language of § 522(f). Instead of furthering the Congressional objective of a fresh start by preventing creditors from over-reaching less powerful consumer debtors, the result reached by the Court of Appeals would penalize a debtor by allowing a creditor to retain, or even threaten to retain, all of the debtors household goods and thus force the debtor to seek a reaffirmation of the debt.

CONCLUSION

For the foregoing reasons, Petitioners respectfully pray that a writ of certiorari should issue to review the Judgment and Opinion of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,



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APPENDIX A

Opinions of the Court of Appeals

RECOMMENDED FOR FULL-TEXT PUBLICATION
See, Sixth Circuit Rule 24

No. 82-5243

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

LAMAR BARCLAY PINE, SR., and SHIRLENE TUCKER PINE, Debtors;

MELVIN GILES and WANDA GILES, Debtors,

Plaintiffs-Appellees,

v.

CREDITHRIFT OF AMERICA, Inc.,

Defendant-Appellant.

ON APPEAL from the United States District Court for the Eastern District of Tennessee.

Decided and Filed September 7, 1983

Before: MERRITT and KENNEDY, Circuit Judges; WEICK, Senior Circuit Judge.

MERRITT, Circuit Judge. These two cases have been consolidated on appeal for opinion because they present common issues of bankruptcy law. In the case of *Pine* v. *Credithrift of America, Inc.*, the Pines filed a voluntary petition in bankruptcy under Chapter 7 of the Bankruptcy Code. They

scheduled certain household goods as property of the estate and claimed the goods as exempt. Prior to the filing of the petition, Credithrift of America, Inc. had obtained as security for a loan a non-possessory, non-purchase money security interest in the household goods of the Pines. The debtors filed a complaint in bankruptcy court seeking to have the security interest avoided under § 522(f) of the Bankruptcy Code. The Bankruptcy Court ordered the lien avoided, and the District Court affirmed the ruling. Credithrift seeks to have their security interest reinstated, claiming that the State of Tennessee[1] has enacted legislation preventing the federal avoidance statute from operating in this case.

In *Giles* v. *Credithrift of America, Inc.*, the plaintiffs filed a Chapter 7 petition in bankruptcy listing various household goods as property of the estate and claiming the property as exempt. As in *Pine*, the Bankruptcy Court ordered that Credithrift's non-possessory, non-purchase money security interest in the debtor's household goods be avoided under 11 U.S.C. § 522(f), and the District Court affirmed. Credithrift again maintains that Georgia's exemption statute precludes the use of the federal avoidance statute.

Section 522(f) of the Bankruptcy Code provides the debtor with a mechanism for preserving exemptions to which he would otherwise be entitled under § 522(b). Section 522(f) provides in relevant part that:

> (f) [T]he debtor may avoid the fixing of a lien on an interest of the debtor in property *to the extent that such lien impairs an exemption to which the debtor would have been entitled under subsection (b)* of this section, if such lien is –
>
> • • •

[1] It is undisputed that the laws of Tennessee should be applied in *Pine* and that the laws of Georgia are applicable in *Giles*.

> (2) a nonpossessory, nonpurchase money security interest in any –
>
> (A) household furnishings, household goods, wearing apparel, appliances, books, animals, crops, musical instruments, or jewelry that are held primarily for the personal, family, or household use of the debtor or a dependent of the debtor. . . .

(Emphasis added.)

This section specifically allows the debtor to avoid only those liens which are on property that would otherwise be exempt under § 522(b). Thus, the avoidance power only comes into play after there has been a determination under § 522(b) of what property may be claimed as exempt.

Section 522(b) then provides for three alternative definitions of exempt property depending on the action of the states – (1) a federal "laundry list" of exemptions itemized in subsection (d) which applies in the absence of any state legislation; (2) the federal list as expressly modified by state legislation by reference to subsection (d); and (3) a new list of exemptions completely defined by state legislation without reference to the federal list contained in subsection (d). Those alternatives are incorporated in the following language of § 522(b):

> (b) [A]n individual debtor may exempt from property the estate either –
>
> (1) property that is specified under subsection (d) of this section [the federal list], unless the State law that is applicable to the debtor under paragraph (2)(A) of this subsection specifically does not so authorize; or in the alternative,
>
> (2)(A) any property that is exempt under . . . State or local law that is applicable on the date of the filing of the petition. . . .

11 U.S.C. § 522(b).

Section 522(b) emerged from Congress as a compromise. The Senate wished to preserve the prerogative of the states to set exemptions for debtors as had been the practice under the old Bankruptcy Act. The House of Representatives, on the other hand, sought to create nationwide uniformity by establishing one list of exemptions contained in the federal Bankruptcy Code. Acting on a conference committee report, Congress passed a compromise bill containing elements of each plan. Section 52(d) contains a "laundry list" of federal exemptions which the debtor may choose instead of the relevant state exemptions.[2]

Both Georgia and Tennessee have "opted out" of the federal list entirely under the alternative provided in subsection (b)(2)(A). The states require that their residents exempt property only under their exemption statutes.[3] The Georgia exemption statute provides in relevant part that:

> [A]ny debtor . . . may exempt . . . for the purposes of bankruptcy . . .
>
> (4) The debtor's interest, not to exceed $200 in value in any particular item, in household furnishings, household goods, wearing apparel, appliances. . . that are held for the personal, family or household use of the debtor or a dependent of the debtor. The exemption of the

---

[2] Section 522(d) lists eleven categories of federal exemptions including household goods.

[3] T.C.A. § 26-2-112 provides as follows:

> *Exemptions for the purpose of bankruptcy.* — The personal property exemptions as provided for in this part, and the other exemptions as provided in other sections of the Tennessee Code Annotated for the citizens of Tennessee, are hereby declared adequate and the citizens of Tennessee, pursuant to section 522(b)(1), Public Law, 95-598 known as the Bankruptcy Reform Act of 1978, Title 11 USC section 522(b)(1), are not authorized to claim as exempt the property described in the Bankruptcy Reform Act of 1978, 11 USC § 522(d).

Georgia has passed a similar statute. *See* Ga. Code Ann. § 51-1601.

> debtor's interest in the items contained in this subsection shall not exceed $3500 in total value. . . .

The Tennessee legislature has also enacted a statute containing a specific list of exemptions for debtors in bankruptcy. T.C.A. § 26-2-102 provides as follows:

> Personal property to the aggregate value of four thousand dollars (4000.00) debtor's equity interest shall be exempt from execution, seizure or attachment . . . [The debtor] may select for exemption the items of the owned and possessed personal property . . . up to the aggregate value of four thousand dollars (4000.00) debtor's equity interest.

The two legislatures have specifically declined to exempt household goods to the extent that they are encumbered by a lien. The Georgia statute refers only to the "debtor's interest" in property and the Tennessee statute refers to the "debtor's equity interest" when delineating the exempt property. Rather than simply listing the type of possessions that are exempt (e.g., the debtor's car) without regard to legal interests or specifying generally that the "debtor's property" is exempt, these two states have said that only the debtor's legal *interest* is exempt. In other words, the debtor may exempt only that interest in property which is owned by him and unencumbered by third party liens.

The debtors in these cases argue that the states may not circumvent the federal avoidance statute by excluding encumbered property from the state's lists of exemptions. They maintain, and the courts below so concluded, that the state's prerogative to opt out of the federal exemption program is limited to specifying the particular items of property – e.g., a car, musical instruments, furniture – and the dollar amounts. Basically, the debtors argue that the states may not specify the types of property interest which qualify for exemptions.

The narrow question before us is whether the word "property" in subsection (2)(A) includes the subdivision of "property" into legal interests or means property in the layman's sense. We believe that the word "property" is used to denote legal interests since the Act throughout characterizes property in terms of various security and other interests. The lawyers who drafted, and the legislators who passed the code understand that property means a bundle of rights in property; and there is no reason to think that they intended to use the word in a sense different from its normal legal meaning.

The Fifth Circuit has reviewed precisely the same issue in *Matter of McManus*, 681 F.2d 353 (5th Cir. 1982). The Louisiana legislature passed an exemption statute opting out of the federal exemption scheme. In addition, the Louisiana statute contains a provision which specifically states that household goods and furnishings which are subject to a chattel mortgage are not exempt. The Fifth Circuit found that Section 522(b)'s authorization to states to enact exclusive exemption plans includes the option to exclude encumbered property. The Fifth Circuit concluded that 522(f) could not be utilized by the debtor to avoid the liens on household goods because the liens "do not impair an exemption to which they would otherwise be entitled under section 522(b)." *Id.* at 357. We agree with the Fifth Circuit that section 522(f) cannot be utilized independently of § 522(b); the debtors may avoid liens only on that property which the states have declared to be exempt.

We recognize that there are policy arguments which would support a different legislative scheme. A purpose of the Bankruptcy Act was to ensure that debtors be able to make fresh starts after bankruptcy. The wiser policy may be to prevent lending institutions from using threats that they will repossess items, worthless to all but the debtor, to force the repayment of loans. *See* S. Rep. No. 95-989, 95th Cong., 2d Sess. 76, U.S. Code Cong. & Ad. News 1978, pp. 5787, 5862. But the clear

language of the statute takes precedence over the more general rehabilitative policies underlying the Act. By enacting the "opting out" scheme without limitation, the legislators expressed their preference for state control of exemptions. We cannot say in the face of the statutory language that Congress intended that § 522(f) should limit the states in their choice of the types of property interests debtors could exempt. The courts below erred because they placed almost exclusive emphasis on legislative history supporting the original version of § 522 as adopted by the House of Representatives. That version was not the law that was finally passed. The legislative history which supports the rejected version is not particularly persuasive on the meaning of the final version. When the language itself is clear, it should be followed in preference to legislative history supporting a different statute.

For these reasons, we reverse the decisions of the District Court and remand these cases for the reinstatement of the security interests of Credithrift of America, Inc.

No. 82-5243

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

LAMAR BARCLAY PINE, SR., and SHIRLENE TUCKER PINE, Debtors; MELVIN GILES and WANDA GILES, Debtors, Plaintiffs-Appellees	FILED Nov. 14, 1983, John P. Hehman, Clerk
V.	ORDER DENYING PETITION FOR REHEARING
CREDITHRIFT OF AMERICA, INC., Defendant-Appellant	

Before: MERRITT and KENNEDY, Circuit Judges; WEICK, Senior Circuit Judge

A majority of the court having not voted in favor of an en banc rehearing, the petition for rehearing has been referred to the hearing panel for disposition.

Upon consideration, it is ORDERED that the petition for rehearing be and hereby is denied.

ENTERED BY ORDER OF THE COURT

/S/John P Hehman
Clerk

APPENDIX B

Opinions of the District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE

In re	)	
	)	
MELVIN GILES and	)	
WANDA GILES, Debtors	)	
	)	
MELVIN GILES and WANDA	)	CIV-1-81-308
GILES, Plaintiffs	)	
	)	
-vs.-	)	
	)	
CREDITHRIFT OF AMERICA,	)	
INC., Defendant	)	

MEMORANDUM

The debtors, residents of Rossville, Georgia, instituted the present action against Credithrift in the Bankruptcy Court to avoid its security interest in certain of their household goods, furnishings, and appliances. Judge Kelley in the Bankruptcy Court ordered Credithrift's lien avoided. Credithrift has appealed.

Credithrift had a $1,361.95 nonpossessory, nonpurchase-money security interest in various appliances and furniture of the

debtors. The Bankruptcy Court held this lien could be avoided under the exemption statute, 11 U.S.C. Section 522. In relevant part it reads:

> "(b) Notwithstanding section 541 of this title, an individual debtor may exempt from property of the estate either--
>
> "(1) property that is specified under subsection (d) of this section, unless the State law that is applicable to the debtor under paragraph (2) (A) of this subsection specifically does not so authorize; or, in the alternative,
>
> "(2) (A) any property that is exempt under Federal law, other than subsection (d) of this section, or State or local law that is applicable on the date of the filing of the petition at the place in which the debtor's domicile has been located for the 180 days immediately preceding the date of the filing of the petition, or for a longer portion of such 180 day period than in any place;
>
> * * *
>
> "(f) Notwithstanding any waiver of exemptions, the debtor may avoid the fixing of a lien on an interest of the debtor in property to the extent that such lien impairs an exemption to which the debtor would have

been entitled under subsection (b) of tnis section, if such lien is

* * *

"(2) a nonpossessory, nonpurchase-money security interest in any--

"(A) household furnishings, household goods, wearing apparel, appliances, books, crops, musical instruments, or jewelry that are held primarily for the personal, family, or household use of the debtor or a dependent of the debtor; * * *"

Georgia rejected the federal exemptions of Sections 522(d) as allowed under 11 U.S.C. Section 522(b)(1) by enacting Ga. Code Ann. Section 51-1601. The exemptions permitted under Georgia law are set forth at Ga. Code Ann. Section 51-1301.1 which reads:

"[A]ny debtor . . . may exempt . . . for the purposes of bankruptcy . . .

"(1) The debtor's aggregate interest, not to exceed $5,000 in value, in property or personal property that the debtor or a dependent . . . uses as a residence . . .;

and

"(2) The debtor's right to receive:

"(A) A social security benefit, unemployment compensation, or a dependent . . . uses as a residence . . .;
and

"(2) The debtor's right to receive:

"(A) A social security benefit, unemployment compensation, or a local public assistance benefit;

"(B) A veteran's benefit;

"(C) A disability, illness, or unemployment benefit;

"(D) Alimony, support, or separate maintenance, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor;

"(E) A payment under a pension, annuity, or similar plan or contract on account of illness, disability, death, age, or length of service to the extent reasonably necessary for the support of the debtor and any dependent of the debtor; and

"(3) The debtor's interest, not to exceed $800 in value, in one motor vehicle; and

"(4) The debtor's interest, not to

exceed $200 in value in any particular item, in household furnishings, household goods, wearing apparel, appliances . . . that are held for the personal, family, or household use of the debtor or a dependent of the debtor. The exemption of the debtor's interest in the items contained in this subsection shall not exceed $3500 in total value; and

"(5) The debtor's aggregate interest, not to exceed $400 in value, in jewelry . . . ; and

"(6) The debtor's aggregate interest . . . in any property; and

"(7) The debtor's aggregate interest . . . in any implements, professional books, or tools of the trade . . .; and

"(8) Any unmatured life insurance contract owned by the debtor, other than a credit life insurance contract ; and

"(9) The debtor's aggregate interest . . . in any accrued dividend or interest under, or loan value of, any unmatured life insurance contract . . .; and

"(10) Professionally prescribed health aids for the debtor or a dependent of the debtor; . . ."

Credithrift maintains that Section 522(f) does not apply to its security interest in the debtor's property. Credithrift claims that because Section 522 was a last minute compromise between the Senate and House bills, the legislative reports relied upon by Judge Kelley were actually written prior to the statute taking its final form and as such are entitled to less weight. It is also urged that the specific language of Section 522(f) makes it inapplicable in the case at hand for two reasons. Credithrift says the language stating the debtor may avoid "the fixing of a lien" on his property only applies to future liens, not pre-existing liens. Secondly, Credithrift says when Section 522(f) lets a debtor avoid liens "on an interest of the debtor in property," it does not apply because the debtor has no interest in property subject to a security interest. Also, Credithrift would have this Court construe the Georgia statute to allow

the debtor to exempt only his equity interest in the property, and not that part of the property subject to a security interest. For the reasons stated below, the Court does not find these arguments persuasive and the decision of the Bankruptcy Court is affirmed.

Regardless of whether the legislative reports referred to by Judge Kelley and reprinted in 5 U.S. Code Cong. & Admin. News (1978) at 5787 preceded the compromise which emerged as Section 522, it is clear that Congress had two overriding reasons for enacting the legislation. The first was to allow the debtor, at the conclusion of the bankruptcy proceedings, sufficient property to support his family and maintain his dignity while starting down the path toward financial rehabilitation. See In re Hand, 4 B.R. 521 (Bankr.Ct.D. Tenn. 1980), Matter of Hahn, 5 B.R. 242 (Bankr.Ct.S.D. Iowa 1980). The second reason was to prevent lending institutions from taking a

security interest in household goods, not because of their value-- which is often minimal on resale-- but because of the leverage lenders could exert on the debtor to reaffirm discharged debts by threatening repossession of the household property. See In re Hand, 4 B. R. 521 (Bankr.Ct. D.Tenn. 1980), Matter of Meyers, 2 B.R. 603 (Bankr. Ct. E. D. Mich. 1980).

In light of these legislative goals, Credithrift's urged construction of Section 522 cannot stand. To provide the debtor with a fresh start, Section 522 must apply to pre-existing liens. Nothing need be added to Section I of the well-reasoned opinion of Judge Kelly in the Bankruptcy Court. Likewise, the debtors clearly have an "interest" in their household goods sufficient to qualify for Section 522's exemption power even if the goods are subject to a security interest up to their full value. A security interest does not preclude other interests in the

collateral.

Finally, Credithrift's argument that the language of the Georgia statute exempting portions of the "debtor's interest" or the "Debtor's aggregate interest" in certain property only allows Section 522(f) to affect the debtor's equity interest in property cannot be supported. It is true that the exemption provision, Part (b), only acts on the debtor's equity interest, however Part (f) acts to avoid liens. If Part (f) was only applicable to the debtor's equity interest, it would accomplish no more than Part (b) and it would fail to achieve the Congressional goal of preventing lenders from exerting undue pressure on debtors through threats to repossess households goods. Part (f) allows the debtors to avoid liens on household goods that would have been exempt under Part (b), but for nonpossessory, nonpurchase money security interests. The result reached in the Bankruptcy Court is affirmed.

An appropriate order will enter.

/S/Frank W. Wilson
United States District Judge

Filed March 22, 1982, Karl D. Saulpaw, Jr., Clerk.
BY/S/G. Ashby
Dep. Clerk

ATTENT:
A true copy certified March 22, 1982
KARL D. SAULPAW, JR., CLERK
By /S/Geneva Ashby
Deputy

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE, SOUTHERN DIVISION

In re MELVIN GILES and WANDA GILES, Debtors MELVIN GILES and WANDA GILES, Plaintiffs - vs. - CREDITHRIFT OF AMERICA, INC., Defendant	CIV-1-81-308 Filed Mar 22, 1982 Ent'd Order BK 26p 388 Karl D. Saulpaw,Jr., Clerk By/S/S. Ashby Dep. Clerk

ORDER

This is an appeal by a creditor from an order of the Bankruptcy Court sustaining a debtor's motion to set aside and avoid a non-possessory, non-purchase-money security interest in certain of the debtors' household furnishings and appliances. The appeal is before this Court upon the record made in the bankruptcy court and upon the briefs of the parties. The Court having entered a memorandum upon the appeal, this order is entered in accordance therewith.

It is accordingly ORDERED that the

decision in the bankruptcy court be affirmed and that this appeal be dismissed with costs taxed to the appellant.

APPROVED FOR ENTRY.

/S/Frank W Wilson
United States District Judge

Entered as a judgment this
22nd day of March, 1982.

KARL D. SAULPAW, JR., CLERK

By /S/ Geneva Ashby
Deputy Clerk

ATTEST:
A true copy.
Certified this Mar 22, 1982
KARL D. SAULPAW, JR., CLERK
By /S/Geneva Ashby
Deputy

IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF TENNESSEE,
SOUTHERN DIVISION

LAMAR BARCLAY PINE, SR.
and SHIRLENE TUCKER PINE

VS. CIV-1-81-307

CREDITHRIFT OF AMERICA,
INC.

MEMORANDUM

The debtors, residents of Ooltewah, Tennessee, instituted the present action against Credithrift in the Bankruptcy Court to avoid its security interest in certain of their household goods. Judge Kelley in the Bankruptcy Court ordered Credithrift's lien avoided. Credithrift has appealed.

Credithrift had a $2,112.00 non-possessory, nonpurchase-money security interest in various household goods of the debtors. The Bankruptcy Court held this lien could be avoided under the exemption statute, 11 U.S.C. § 522. In

relevant part it reads:

> "(b) Notwithstanding section 541 of this title, an individual debtor may exempt from property of the estate either--
>
> "(1) property that is specified under subsection (d) of this section, unless the State law that is applicable to the debtor under paragraph (2)(A) of this subsection specifically does not so authorize; or, in the alternative,
>
> "(2)(A) any property that is exempt under Federal law, other than subsection (d) of this section, or State or local law that is applicable on the date of the filing of the petition at the place in which the debtor's domicile has been located for the 180 days immediately preceding the date of the filing of the petition, or for a longer portion of such 180-day period than in any other place;
>
> "(f) Notwithstanding any waiver of exemptions, the debtor may avoid the fixing of a lien on an interest of the debtor in property to the extent that such lien impairs an exemption to which the debtor would have been entitled under subsection (b) of this section, if such lien is
>
> * * *
>
> "(2) a nonpossessory, nonpurchase-money security interest in any--

> "(A) household furnishings, household goods, wearing apparel, appliances, books, crops, musical instruments, or jewelry that are held primarily for the personal, family, or household use of the debtor or a dependent of the debtor; * * *" (Emphasis added)

Tennessee rejected the federal exemptions of Section 522(d) as allowed under 11 U.S.C. § 522(b)(1) by enacting the Personal Property Owner's Rights and Garnishment Act of 1978 at TCA §§ 26-2-101 et seq. The relevant exemptions permitted under Tennessee law for household goods are set forth in TCA § 26-2-102, which reads:

> "Personal property to the aggregate value of four thousand dollars $4,000) debtor's equity interest shall be exempt from execution, seizure or attachment in the hands or possession of any person who is a bona fide citizen permanently residing in Tennessee, and such person shall be entitled to this exemption without regard to his vocation or pursuit or to the ownership of his abode. Such person may select for exemption the items of the owned and possessed personal

> property, including money and funds on deposit with a bank or other financial institution, up to the aggregate value of four thousand dollars ($,000) debtor's equity interest."

Credithrift maintains that the language of Section 522(f), "the debtor may avoid the fixing of a lien on . . . property to the extent that such lien impairs an exemption to which the debtor would have been entitled under subsection (b) of this section [allowing the State exemption] if such lien is . . . a nonpossessory, nonpurchase-money security interest in any . . . household furnishings . . . ." does not apply to its security interest in the debtor's property. Credithrift claims that the Tennessee exemption statute only applies to the equity interest of the debtors, not as an absolute $4,000 exemption. Indeed the wording of the Tennessee statute indicates it is only to apply to the

debtor's equity interest. In this case, the debtor has no equity interest in the collateral and under Credithrift's interpretation would be allowed no exemption.

Credithrift's argument fails to accurately analyze the exemption provisions of Section 522. Under Section 522(b) Credithrift's interpretation is correct. Part (b) allows exemption according to the State's choice and in Tennessee, that is only the debtor's equity interest. However, Part (f) is a separate exemption and makes no allowance for a State to alter the mechanics of its operation, only the amount.

Section 522 was enacted to provide sufficient exemptions to allow the debtor to maintain his dignity and support his family while starting down the road to financial recovery. See In re Hand, 4 B.R.

521 (Bankr. Ct. D. Tenn. 1980) Matter of Hahn, 5 B.R. 242 (Bankr. Ct. S.D. Iowa 1980). Part (f) of Section 522 was enacted to accomplish a second but related Congressional goal. This was to prevent lending institutions from taking a security interest in household goods, not for the goods' value--which is often minimal on resale--but for the leverage lenders could exert on the debtor to reaffirm discharged debts by threatening repossession of the household property. See In re Hand, supra, Matter of Meyers, 2 B.R. 603 (Bankr. Ct. E.D. Mich. 1980), and the excellent review of the legislative history in Judge Kelley's opinion in this case.

Construing the exemption of Part (f) in light of these Congressional goals, it is apparent that Part (f) is intended to broaden the exemption provided in Part

(b). Part (f) allows the debtor to avoid a nonpossessory, nonpurchase-money security interest on household goods which impairs an exemption to which the debtor would have been entitled under Part (b). Except for the nonpossessory, nonpurchase-money security interestof Credithrift, the debtors would have been able to exempt their household furnishings under Part (b) and TCA § 26-2-102. Part (f) allows the debtors to exempt these household furnishings anyway, in order to accomplish the Congressional goal of protecting debtors from the coercive threat of repossession of household furnishings.

Part (f) allows debtors to create equity by avoiding nonpossessory, nonpurchase-money liens. States cannot choose whether or not they will allow such liens to be avoided under Part (f). That choice is only available to states

under Part (b)'s exemption but not under Part (f). The cases cited by Credithrift, in re Panesky, 5 B.R. 201 (Bankr. Ct. W.D. Ca. 1981), are believed to be incorrect in holding to the contrary Part (f) would be a mere redundancy if construed, as in the above cases, to allow only exemptions for the property exempt under Part (b). Part (f) allows avoidance of liens, not just the exemptions of Part (b). Hence by avoiding liens, Part (f) allows exemption of property that would have been exempt under Part (b) if the liens did not exist. See in re Farris, 8 B.R. 186 (Bankr. Ct. E.D. Tenn. 1981). Credithrift's arguments that the interpretation of Part (f) should be otherwise are not persuasive.

Similarly, Credithrift's contention that the language of Section 522(f), "the debtor may avoid the fixing of a lien on

an interest of the debtor in property" (emphasis added), is not applicable to the present situation must fail in light of the previously mentioned legislative goals. Credithrift argues that "fixing" only applies to the fixing of new liens, not pre-existing liens and that the debtors have no "interest" in property subject to a security interest for its full value. It is sufficient to note that in order for Section 522 to provide the debtor with a fresh start, its exemption provisions must apply to pre-existing liens and that a security interest does not preclude other interests in the collateral. The decision of the Bankruptcy Court is affirmed.

An order will enter accordingly.

/S/Frank W. Wilson
United States District Judge

Filed March 22, 1982, Karl D. Saulpaw, Jr., Clerk.
By/S/G. Ashby
Dep. Clerk

APPENDIX C

Opinions of the Bankruptcy Court

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF TENNESSEE

In re

MELVIN GILES
WANDA GILES

Debtors

No. 1-80-02318

Chapter 7

MELVIN GILES
WANDA GILES

Plaintiffs

v.

CREDITHRIFT OF AMERICA, INC.

Defendant

Adversary Proceeding
No. 1-80-0647

MEMORANDUM

APPEARANCES: Mark T. Young, Chattanooga, Tennessee, for the Plaintiffs
Mark J. Mayfield, Chattaooga, Tennessee, for the Defendant

FILED February 12, 1981, Genevieve Chambliss, Clerk, U.S. Bankruptcy Court, Chattanooga, Tennessee

The defendant, Credithrift, made a motion for summary judgment which raised several legal arguments against applying the statute on which the plaintiffs rely. Credithrift raised no other defenses. The court's decision on the motion will dispose of this proceeding.

The debtors brought this cause of action against Credithrift to avoid its security interest in certain of their household goods or furnishings and appliances. Under section 522(f)(2) of the Bankruptcy Code, the debtors can avoid the security interest only if it is non-possessory and nonpurchase money. 11 U.S.C. Section 522(f) (1979). It is not disputed that the debtor has possession of the goods in question and that the security interest is nonpurchase money. The motion for summary judgment raises several legal arguments against applying Section 522(f)(2). One argument, adopted by reference to the brief in another case, relies on some seemingly unneeded words in Section 522(f). The court addresses that argument first.

I.

Section 522(f) (2) (A) of the Bankruptcy Code provides:

(f) Notwithstanding any waiver of exemptions, the debtor may avoid the fixing of a lien on an interest of the debtor in property to the extent that such lien impairs an exemption to which the debtor would have been entitled . . . if such lien is —

. . . .

(2) a nonpossessory, nonpurchase-money security interest in any —

(A) household furnishings, household goods, wearing apparel, appliances, books, animals, crops, musical instruments, or jewelry that are held primarily for the personal, family, or household use of the debtor or a dependent of the debtor;

. . . .

(Emphasis added.).

Credithrift argues that section 522(f) only avoids the fixing of a lien and not an already existing lien. Why Congress used "the fixing of a lien" is not immediately apparent. But the argument must be rejected for several reasons.

It is apparent from the legislative history that section 522(f) was meant to apply to

security interests already existing and attached at the time of bankruptcy. S.Rep.No. 95-986, 95th Cong., 2d Sess. 76 (1978); H.R.Rep.No. 95-595, 95th Cong., 1st Sess. 362 (1977); Report of the Commission on Bankruptcy Laws of the United States, H.R.Doc. No. 93-197, 93d Cong., 1st Sess., Part I at 169, 173 (1973). Section 522 (f) would not serve its intended purpose if it applied only to security interests that attached to property of the estate, which is essentially Credithrift's argument. Congress was meticulous in its use of property of the debtor or property of the estate. See, e.g., 11 U.S.C. Section 362(a) (4) & (5) (1979). Contrary to Credithrift's argument, Section 522(f) uses "an interest of the debtor in property". Furthermore, Section 522(f) makes avoidable a lien that "impairs", not would impair, an exemption and that "is", not would be, a security interest. Thus Credithrift's argument is contrary to the purpose and the wording of Section 522 (f).

The court can see one reason for Congress's

use of "the fixing of" a lien. Other subsections of Section 522 refer to "transfers" avoidable under Section 522(f). 11 U.S.C. Section 522 (g) (2) & (i) (1979). Technically the fixing of a lien is a transfer, but the lien itself is not. 11 U.S.C. Section 101 (40) (1979) (Transfer defined).

Thus Section 522(f) relates avoidance back to the original attaching of the security interest. That is analogous to avoidance of a late perfected security interest under the preferential transfer section. Under that section, technically the trustee avoids the grant of the security interest, the transfer made within the preference period. 11 U.S.C. Section 547 (1979). The terminology used in Section 522(f) is surprising as a practical matter but consistent in concept with other provisions of the Code.

Credithrift relies on subsection (c) of Section 522 as further support for its argument. It provides:

(c) Unless the case is dismissed,

> property exempted under this section is not liable . . . after the case for any debt of the debtor that arose . . . before commencement of the case, except—
>
> (1) [certain debts not discharged];
>
> (2) a lien that is not avoided under section 544, 545, 547, 548, 549, or 724(a) of this title;
>
> . . . .

Credithrift points out that Section 522(f) is not listed in the avoidance sections. The logical inference is that liens avoided under one of the listed sections do not survive discharge. As to liens avoided under any other section, including Section 522(f), Credithrift infers that they survive bankruptcy. That inference is partly correct.

Section 522(c) deals with liens on property exempted under Section 522. That includes property exempted by the use of Section 522(f). It was not necessary to include Section 522(f) in the list. It was necessary to omit it because of the difference between it and the listed avoiding powers. Avoidance under Section 522(f) is only up to the amount of the impaired exemption. It may be

partial avoidance. Avoidance under the other sections is total. Leaving out Section 522(f) makes it clear that liens avoided under it may partially survive bankruptcy. See 3 Collier on Bankruptcy 522.29 (15th ed. 1979).

Credithrift's argument as to "the fixing" of liens is rejected.

II.

Credithrift apparently makes an argument that is more clearly made in the attached brief from another case. Section 522(f) refers to "an interest of the debtor in property". That obviously is a broad category. It does not allow the argument that the debtors have no interest in the collateral in question. No matter what terminology is used, a security interest is merely a lien on the collateral. Ga. Code Ann. Sections 109A-1-201-(37), 109A-2-401 (1), & 109A-9-102(a) (1) & (2) (1979). A security interest up to the amount of the debt, or the value of the collateral if it is less, does not exclude other interest in the collateral. The

debtors are the owners of the collateral. They have an interest in it even if the secured debt exceeds its value. Thus Credithrift's security interest is a lien on property in which the debtors have an interest, and it follows that the security interest may impair the debtors' right to exempt their interest.

III.

Credithrift also argues that its security interest does not "impair an exemption to which the debtors[s] would have been entitled". In this case the debtors' exemptions under Section 522(b) are set by Georgia statute, quoted in the margin. 11 U.S.C. Section 522(b) (2) (1979). [1]

---

[1] **51-1301.1 Alternative exemption.**

(A)ny debtor . . . may exempt . . . for the purposes of bankruptcy . . .

(1) The debtor's aggregate interest, not to exceed $5,000 in value, in real property or personal property that the debtor or a dependent . . . uses as a resident . . .; and

. . . .

(3) The debtor's interest, not to exceed $800 in value, in one motor vehicle; and

(4) The debtor's interest, not to exceed $200 in value in any particular item, in household furnishings, household goods, wearing apparel, appliances . . . that are held for the personal, family, or household use of the debtor or a dependent of the debtor. The exemption of the debtor's interest in the items contained in this subsection shall not exceed $3500 in total value; and

(5) The debtor's aggregate interest, not to exceed $400 in value, in jewelry . . . .; and

(6) The debtor's aggregate interest . . . in any property; and

(7) The debtor's aggregate interest . . . in any implements, professional books, or tools of the trade . . .; and

(9) The debtor's aggregate interest . . . in any accrued dividend or interest under, or loan value of, any unmatured life insurance contract . . .; and

. . . .

The argument is the same as the argument made in In re Farris, except in that case a Tennessee exemption statute was involved. No. 1-80-01433 (Bankr. Ct. E.D. Tenn. Jan. 14, 1981) (Farris V. Barclays American Financial, Inc., No. 1-80-0342). The argument depends first on whether the exemption allowed by the Georgia statute can be claimed only in the debtors' equity in the mortgaged property, i.e., the amount by which its value exceeds secured debts.

The Georgia statute does not specifically so provide. The court rejects Credithrift's argument that "debtor's interest") is used in the statute to mean only a debtor's equity in mortgaged property. The difference in terminology depends on whether the exemptable property is referred to in the aggregate.

Furthermore, unlike the Tennessee statute, the Georgia statute specifically provides exemptions

"for the purposes of bankruptcy". [2] In bankruptcy the general rule is that a debtor's exemptions in mortgaged property come out of the debtor's equity. In re Morgan, 6 B.C.D. 1202 (Bankr. Ct. M. D. Tenn. 1980); In re Boteler, 5 B.R. 408, 6 B.C.D. 798, (Bankr. Ct. S.D. Ala. 1980) (Day v. Boteler). Congress took that into account in Section 522(f). The congressional committee reports explain that Section 522(f) is meant to avoid a lien on property that could have been exempted in the absence of the lien. S. Rep. No. 95-989, 95th Cong., 2d Sess. (1978); H.R. Rep. No. 95-595, 95th Cong., 2d Sess. 380-381 (1977). The Georgia statute indentifies the types of exemptable property and sets limits on its value. But the statute does not otherwise affect the lien avoidance nature of Section 522(f).

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[2] The court notes that it apparently was derived from the federal exemptions. 11 U.S.C. Section 522(d) (1979).

Finally, assuming the Georgia statute was meant to allow exemptions only in the debtor's equity, that would not change the effect of Section 522(f). As the court said, Section 522(f) was enacted with the understanding that exemptions come out of equity. To that end it is meant to avoid liens so that there will be equity out of which exemptions may be taken.

It is doubtful that a state can define exemptions so that Section 522(f) will be rendered ineffective. In re Fisher, 6 B.R. 206, 2 C.B.C. 2d 1335 (Bankr. Ct. N.D. Ohio 1980) (Fisher v. Liberty Loan Corp.); In re Cox, 4 B.R. 240, 6 B.C.D. 434, 2 C.B.C. 2d 255 (Bankr. Ct. S.D. Ohio 1980) (Cox v. Blazer Financial Services, Inc.); In re Hill, 4 B.R. 310, 6 B.C.D. 307, 2 C.B.C. 2d 123 (Bankr Ct. N.D. Ohio 1980). It does not appear that any such attempt was made in the Georgia statute.

IV.

The attached brief contains another argument much like the previous argument. The first proposition is that exemptions are allowed out of property of the estate. The second proposition is that the secured party's interest does not become part of the estate. The creditor argues that to the extent it is liable for the secured debt, the collateral does not become part of the estate, no exemptions could be allowed out of it, and so no exemption is impaired by the security interest.

There is nothing wrong with the first proposition. Exempt property becomes property of the bankruptcy estate. 11 U.S.C. Sections 541(a), 522 (b); 4 Collier on Bankruptcy Par. 541.02[3] (15th ed. 1979).

There is technically nothing wrong with the second proposition. But it does not lead to the conclusion argued for.

The argument misinterprets the meaning of "interest" in property.[3] The debtor's interest in collateral is an interest in all the collateral, each and every item, without regard to what is owed. The secured party's interest is a right to payment from the collateral, a lien that applies to each and every item. Of course, the secured party is not entitled to more than payment. It may be said that the equity belongs to the debtor, but each item of collateral is still subject to the security interest.

---

[3] As to Section 541 of the Code, the committee reports explain:

> The scope of this paragraph is broad. It includes all kinds of property, including tangible or intangible property, causes of action . . ., and all other forms of property currently specified in section 70a of the Bankruptcy Act . . . . The debtor's interest in property also includes "title" to property which is an interest, just as are a possessory interest, or leasehold interest, for example.

S. Rep. No. 95-989,95th Cong., 2d Sess. 82 (1978); H.R.Rep. No. 95-595, 95th Cong., 1st Sess. 367 (1977).

Likewise, the secured party's interest (the lien) belongs to it, but the collateral does not belong to the secured party to the extent of the debt. [4] The debtor still has an interest in it.

Thus the debtors had an interest in the collateral, which interest became property of the estate and would have been exemptable except for the security interest. Section 522(f) will avoid the security interest and make the debtors' interest exemptable.

Conclusion

The legal arguments that are the bases for the motion for summary judgment are not supported by the statute or the decisions under it. Accordingly, an order will be entered denying the motion and granting the plaintiffs the relief requested.

---

[4] The lien does not become part of the estate. See Section 522(c), above, and 3 Collier on Bankruptcy Par. 522.27 (15th ed. 1979).

This memorandum constitutes findings of fact and conclusions of law. Bankruptcy Rule 752.

At Chattanooga, Tennessee.

BY THE COURT

/S/Ralph H. Kelley
Ralph H. Kelley
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF TENNESSEE

In re

MELVIN GILES
WANDA GILES

Debtors

No. 1-80-02318

Chapter 7

MELVIN GILES
WANDA GILES

Plaintiffs

v.

CREDITHRIFT OF AMERICA, INC.

Defendant

Adversary Proceeding
No. 1-80-0647

ORDER

In accordance with the court's memorandum of this date, it is ordered that

The security interest of the defendant, Credithrift of America, Inc., in certain household goods and appliances of the plaintiffs, Melvin and Wanda Giles, is avoided.

The defendant shall furnish the plaintiffs with the necessary documents releasing

the avoided security interest.

The plaintiffs shall retain the household goods and appliances as exempt property free of the defendant's avoided security interest.

At Chattanooga, Tennessee.

BY THE COURT

/S/Ralph H. Kelley
Ralph H. Kelley
United States Bankruptcy Judge

FILED February 12, 1981, Genevieve Chambliss, Clerk, U. S. Bankruptcy Court, Chattanooga, Tennessee

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF TENNESSEE

In re

MELVIN GILES
WANDA GILES

Debtors

No. 1-80-02318

Chapter 7

MELVIN GILES
WANDA GILES

Plaintiffs

v.

CREDITHRIFT OF AMERICA, INC.

Defendant

Adversary Proceeding
No. 1-80-0647

MEMORANDUM AND ORDER

The defendant, Credithrift of America, Inc., has made a motion for additional findings of fact and conclusions of law. Credithrift asks the court to add:

> On November 19, 1980, the plaintiffs filed a bankruptcy under Chapter 7 of the Bankruptcy Reform Act of 1978, listing the defendant as a creditor. The defendant, Credithrift of

America, Inc., filed a claim listing a nonpurchase money security interest in household goods as security for the debt.

Most of those additional facts are found in the court's memorandum. The only true additions are the date of filing, that the petition was under Chapter 7, and that Credithrift was listed as a creditor and filed a claim.

It appears that the proposed additions are implicit in the court's opinion. Nevertheless for the purpose of clarity in the event of an appeal the court makes the following additional findings of fact.

On November 19, 1980 the debtors filed their petition in bankruptcy under Chapter 7 of the Bankruptcy Code. (11 U.S.C.). The defendant was scheduled as a creditor and filed a proof of claim.

At Chattanooga, Tennessee

BY THE COURT

/S/Ralph H. Kelley
Ralph H. Kelley
United States Bankruptcy Judge

FILED May 27, 1981, Genevieve Chambliss, Clerk,
U.S. Bankruptcy Court, Chattanooga, Tennessee

UNITES STATES BANKRUPTCY COURT
EASTERN DISTRICT OF TENNESSEE

In re

No. 1-80-02549

LAMAR BARCLAY PINE, SR., &
SHIRLENE TUCKER PINE

Debtors

LAMAR BARCLAY PINE, SR. &
SHIRLENE TUCKER PINE

Plaintiffs

v.

Adversary Proceeding
No. 1-80-0073

CREDITHRIFT OF AMERICA, INC.

Defendant

MEMORANDUM

APPEARANCES: Ronald J. Berke, Chattanooga, Tennessee, for the Plaintiffs
Mark J. Mayfield, Chattanooga, Tennessee, for the Defendant

FILED May 26, 1981, Genevieve Chambliss, Clerk, U.S. Bankruptcy Court, Chattanooga, Tennessee

On December 31, 1980, debtors filed a voluntary Petition under Chapter 7 of the Bankruptcy Reform Act of 1978. 11 U.S.C. 101 et seq (the "Code").

The debtors scheduled certain household goods and claimed them as exempt. No objection was filed to the claim of exemptions.

Debtors filed an adversary proceeding against Credithrift of America, Inc., seeking to avoid a nonpossessory, non-purchase money security interest in household goods under 11 U.S.C. 522(f)(2).

The creditor filed an answer and cross complaint as follows:

ANSWER

For answer to the complaint herein filed against it, Credithrift of America, Inc., through its attorney, respectfully shows:

1. It admits jurisdiction.

2. It admits plaintiffs-debtors filed a bankruptcy under Chapter 7, Title II, U.S.C. on

December 31, 1980, and that this defendant-creditor was duly scheduled.

3. It admits it has a non-purchase money security interest in household goods.

4. It denies the Bankruptcy Reform Act of 1978, Title II, United States Code, provides for the voiding of its security interest.

5. If wrong under paragraph 4, above, then, the State of Tennessee has opted out of the Federal Exemptions under 11 U.S.C. § 522, and Tennessee Exemptions do not interfere with plaintiff-debtors' exemptions. The portion of the property subject to the security interest is not exempt under Tennessee law.

6. Defendant-creditor has a valid security interest which survives this proceeding.

And, now, having fully answered, this defendant-creditor prays to be dismissed with its costs.

CROSS-COMPLAINT

And now assuming the position of a cross-complainant, Credithrift of America, Inc. respectfully shows:

7. That it is entitled to recover possession of its security under its security agreement, with

damages for the detention.

> WHEREFORE, cross-complainant prays that it be permitted to reclaim its security, and that debtors be ordered to surrender up same upon demand, with damages for the detenion, and costs.

Generally, the issues raised by Credithrift have been dealt with by this court in two earlier decisions. In re Giles, Adv. No. 1-80-0647, Case No. 1-80-02319 (Feb. 12, 1981) (Giles v. Credithrift of America, Inc.); in re Farris, Adv. No. 1-80-0324, Case No. 1-80-01433 (Jan. 14, 1981) (Farris v. Barclays American Financial, Inc.).

The court's opinions in Farris and Giles are attached and incorporated as a part of this memorandum.

Those opinions do not outline the legislative history regarding the enactment of 11 U.S.C. 522(f). This opinion will provide some background and commentary on the subject of avoidance of

nonpossessory, nonpurchase money security interest in household items.

We will start with a report of the Commission on the Bankruptcy Laws of the United States in its 1973 Report to The President, The Chief Justice of the United States and The Congress. House Document No. 93-127, Part II, 93rd Congress, 1st Session.

The following appears in the report:

At page 196:

> Of particular importance to the consumer debtor are exemptions and discharge. These are essential features of a system of financial rehabilitation of financially troubled individuals. Although the need for exemptions and discharge is recognized by the present Act, its provisions are ineffective.
>
> * * *
>
> The Commission is also of the opinion that nonpurchase-money security interests should not be enforceable as to items of property essential to a debtor's well-being, such as wearing apparel, which are of little or no value to a creditor, other than as a means of coercing payment.

At page 170:

> In order to make the exemption policy more effective, the Commission recommends that a waiver of the federal exemptions be unenforceable by a creditor that does not have security in the property, and that nonpurchase money security be unenforceable as to wearing apparel, household goods, and health aids.

At page 173:

> a. Nonwaiver. The Commission recommends that the federal exemption policy not be frustrated by consensual waivers. A creditor should be allowed to prevail over the allowable exemptions only if security is taken. What is often an unknowing or uninformed surrender of exemption rights should no longer be countenanced under the federal bankruptcy law. And in recognition of the possibility that creditors will simply obtain security, both as to existing and after-acquired assets, rather than rely on waivers, the Commission recommends that nonpurchase-money security interests in wearing apparel, household goods, and health aids be unenforceable against property allowed to the debtor as exempt.

Following the report of the Commission on Bankruptcy Laws of the United States the Congress commenced hearings on revision of the Bankruptcy Act.

One witness who testified before the House Judiciary Committee was David H. Williams, an attorney with the Division of Special Projects, Bureau of Consumer Protection, Federal Trade Commission. His testimony commences on page 166, H. R. Report 95-595, 95th Congress, 1st Session. He testified that from

> 1972-1974 the staff of the Division of Special Projects visited one hundred and thirty branch offices of twelve major consumer finance companies. Thirty states were visited.
>
> * * *
>
> Overall, this investigation afforded us with in depth exposure to the day to day activities of the consumer finance industry. It enabled us to develop a composite picture of thousands of debtors who experienced default and collection during the years in question.
>
> The purpose of this investigation was to identify certain statutory and contractual collection remedies and procedures which might be unfair to consumers within the meaning of Section Five of the Federal Trade Commission Act.

It was the conclusion of the witness that

One of the most important and widely abused devices available to the large credit institution is a blanket security interest in household necessities.

* * *

Virtually every creditor we investigated retained such a lien in all appropriate contracts. Some liens are specific, enumerating furniture, bedding, linens, pots and pans, and the like. Other were cast in general form merely applying to every household good of every kind and description.

. . . [A] blanket lien on household goods is among the most effective levers available for securing an anticipatory reaffirmation of a debt which is otherwise dischargeable in bankruptcy.

Based on the cases we examined in our investigation, and on the findings and recommendations prepared by the National Commission on Consumer Finance, we believe that there is no justification whatsoever for the common practice of requiring debtors to pledge all of their household property to small lenders. For this reason, we support the proposed unwaivable exemption with respect to assets in the bankrupt estate of an individual consumer. We can conceive of few practices in today's consumer market which are more debilitating and demoralizing than the repeated threat to seize the household necessities of an insolvent and his family, items

> which, as a practical matter, have little if any economic value to the creditor. These kinds of threats do not enhance the economic situation of either party. They subvert the specific policy which underpins personal bankruptcy.

In 1977 the House of Representatives ordered printed a report on Bankruptcy Law Revision. H.R. Report No. 95-595, 95th Congress, 1st Session. It contains 549 pages.

The following portions of the report appear relevant to the present case. At pages 116-118:

> As we have become a consumer society, we have also become a credit society. The Bankruptcy Commission documented the tremendous rise in the amount of credit outstanding for personal, family, or household purposes, and it is not necessary to reiterate those data here.
>
> The result of the increase in consumer credit has been a corresponding increase in the number of consumers who have overburdened themselves with debt.
>
> . . . When the crises finally erupt, the experience of the [credit] industry in collecting from overburdened debtors allows it an enormous advantage against the in-

experienced and generally distraught consumer . . . Bankruptcy often provides the only remedy.

However, under current law, the resort to bankruptcy has not always provided an effective remedy. . .

Creditors have developed techniques that enable them to avoid the effects of a debtor's bankruptcy, and bankrupts have suffered accordingly. Frequently they come through bankruptcy little better off than they were before. Overboard security interests on all of a consumer's household and personal goods, reaffirmations, limited State exemption laws, and litigation over dischargeability of certain debts have all contributed to the consumer debtor's post-bankruptcy plight.

This bill attempts to cure these inadequacies in the Bankruptcy Act and to prevent the frequent problems confronting consumer debtors that have occurred both in the bankruptcy court and out.

* * *

. . . [W]hether the debtor uses Chapter 7, Liquidation, or Chapter 13, Adjustment of Debts of an individual, bankruptcy relief should be effective, and should provide the debtor with a fresh start.

The report examines the subject of exemptions. At pages 126 and 127, it states:

. . . The historical purpose of these exemption laws has been to protect a debtor from his creditors, to provide him with the basic necessities of life so that even if his creditors levy on all of his nonexempt property, the debtor will not be left destitute and a public charge.

* * *

. . . [T]here is a Federal interest in seeing that a debtor that goes through bankruptcy comes out with adequate possessions to begin his fresh start.

* * *

In addition, the bill gives the debtor certain rights not available under current law with respect to exempt property. The debtor may void any judicial lien on exempt property, and any nonpurchase money security interest in certain exempt property, such as household goods. The first right allows the debtor to undo the actions of creditors that bring legal action against the debtor shortly before bankruptcy. Bankruptcy exists to provide relief for an overburdened debtor. If a creditor beats the debtor into court, the debtor is nevertheless entitled to his exemptions. The second right will be of more significance for the average consumer debtor. Frequently, creditors lending money to a consumer debtor take a security interest in all of the debtor's be-

longings, and obtain a waiver by the debtor of his exemptions. In most of these cases, the debtor is unaware of the consequences of the forms he signs. The creditor's experience provides him with a substantial advantage. If the debtor encounters financial difficulty, creditors often use threats of repossession of all of the debtor's household goods as a means of obtaining payment.

In fact, were the creditor to carry through on his threat and foreclose on the property, he would receive little, for household goods have little resale value. They are far more valuable to the creditor in the debtor's hands, for they provide a credible basis for the threat, because the replacement costs of the goods are generally high. Thus, creditors rarely repossess, and debtors, ignorant of the creditors' true intentions, are coerced into payments they simply cannot afford to make.

The exemption provision allows the debtor, after bankruptcy has been filed, and creditor collection techniques have been stayed, to undo the consequences of a contract of adhesion, signed in ignorance, by permitting the invalidation of nonpurchase money security interests in household goods. Such security interests have too often been used by over-reaching creditors. The bill eliminates any unfair advantage creditors have. (Emphasis added)

It is 11 U.S.C. 522(f) which permits

the avoidance of certain liens. At page 362 the House Report says of this section:

> Subsection (f) protects the debtor's exemptions, his discharge, and thus his fresh start by permitting him to avoid certain liens on exempt property. The debtor may avoid a judicial lien on any property to the extent that the property could have been exempted in the absence of the lien, and may similarly avoid a nonpurchase-money security interest in certain household and personal goods. The avoiding power is independent of any waiver of exemptions.

In May of 1978 the Senate ordered to be printed S. Report 95-989, 95th Congress 2d Session. The report contained 177 pages.

As to avoiding power of § 522(f) the Senate Report at page 76 states the subsection:

> . . . protects the debtor's exemptions, his discharge, and thus his fresh start by permitting him to avoid certain liens on exempt property. The debtor may avoid a judicial lien on any property to the extent that the property could have been exempted in the absence of the lien, and may similarly avoid a

> nonpurchase-money security interest in certain household and personal goods. The avoiding power is independent of any waiver of exemptions.

There appears to be agreement in the reports of the Senate and House as to the meaning of the section in question. The two bodies adopt identical language.

After years of study and compromise the House and Senate finally agreed on a new bankruptcy law. It was forwarded to the White House in October, 1978.

On November 6, 1978, the President signed the fifth bankruptcy law of the United States. It is cited as Pub. L. No. 95-598 and contains § 522(f), as follows:

> (f) Notwithstanding any waiver of exemptions, the debtor may avoid the fixing of a lien on an interest of the debtor in property to the extent that such lien impairs an exemption to which the debtor would have been entitled under Subsection (b) of this section, if such lien is--

(1) a judicial lien; or

(2) a nonpossessory, non-purchase money security interest in any--

(A) household furnishings, household goods, wearing apparel, applicances, books, animals, crops, musical instruments, or jewelry that are held primarily for the personal, family, or household use of the debtor or a dependent of the debtor;

(B) implements, professional books, or tools, of the trade of the debtor or the trade of a dependent of the debtor; or

(C) professionally prescribed health aids for the debtor or a dependent of the debtor.

While there were substantial differences in many sections of the Senate and House bills, it should be noted that as to avoidance of certain liens by the debtor, there was no difference.

The history of the avoidance section is as follows:

On September 8, 1977, the Committee on Judiciary of the House of Representatives reported favorably H.R. 8200.

It contained § 522(f) as follows:

> (f) The debtor may avoid the fixing of a lien on an interest of the debtor in property to the extent that such lien impairs an exemption to which the debtor, notwithstanding any waiver of exemptions, would have been entitled under subsection (b) of this section, if such lien is—
>
> (1) a judicial lien; or
>
> (2) a nonpurchase-money security interest in any--
>
> (A) household furnishings, household goods, wearing appearl, appliances, books, animals, crops, musical instruments, or jewelry that are held primarily for the personal, family, or household use of the debtor or a dependent of the debtor;
>
> (B) implements, professional books, or tools, of the trade of the debtor or the trade of a dependent of the debtor; or
>
> (C) professionally prescribed health aids for the debtor or a dependent of the debtor.

On July 14, 1978, the Committee on Judiciary of the United States Senate reported favorably S.2266.

It contained § 522(e) as follows:

(e) Notwithstanding any waiver of exemptions, the debtor may avoid the fixing of a lien on an interest of the debtor in property to the extent that such lien impairs an exemption to which the debtor would have been entitled under subsection (b) of this section, if such lien is--

(1) a judicial lien; or

(2) a nonpossessory nonpurchase - money security interest in any--

(A) household furnishings, household goods, wearing apparel, appliances, books, animals, crops, musical instruments, or jewelry that are held primarily for the personal, family, or household use of the debtor or a dependent of the debtor;

(B) implements, professional books, or tools, of the trade of the debtor or the trade of a dependent of the debtor; or

(C) professionally prescribed health aids for the debtor or a dependent of the debtor.

As noted earlier the reports of each legislative body explaining the avoiding power are identical. Each report clearly says that:

. . . The debtor may avoid a . . . nonpurchase-money security

> interest in certain household and personal goods. The avoiding power is independent of any waiver of exemptions.

In spite of the legislative history it is creditor's contention that:

> . . . § 522(f) does not provide for the declaring of a nonpurchase-money security interest void or unenforceable. Reading the language of that section as stated in ordinary everyday language, it prohibits any further liens from being placed upon the exempt property.

The creditor further argues:

> . . . that the purpose of this Subsection is not to void or knock off a lien already existing (which is not subject to the Trustee's voiding powers), but is to prevent a lien from "fixing" on property which is properly claimed as exempt. A lien already existing does not have to fix; it is already fixed.

It is apparent from the legislative history that § 522(f) was meant to apply to security interests already existing and attached at the time of bankruptcy. S. Rep.No. 95-989, 95th Cong., 2d Sess. 76 (1978); H.R.Rep.No. 95-595, 95th Cong.,

1st Sess. 362 (1977); Report of the Commission on Bankruptcy Laws of the United States, H.R.Doc.No. 93-197, 93rd Cong., 1st Sess., Part I at 169, 173 (1973). Why Congress used the term "fixing of a lien" is not immediately apparent.

The court can see one reason for Congress' use of the term "fixing of a lien." Other subsections of § 522 refer to "transfers" avoidable under § 522(f). 11 U.S.C. § 522(g)(2) & (i) (1979). Technically the "fixing of a lien" is a transfer, but the lien itself is not. 11 U.S.C. § 101(40) (1979). (Transfer defined).

Section 522(f) allows the debtor to avoid the very granting of a lien. Granting of a lien is synonymous with "fixing of a lien." Even under the Act one definition of a "transfer" was the

"fixing of a lien." 11 U.S.C. 101(30).

What the debtor is doing is analogous to the trustee's avoidance of a late perfected security interest under the preferential transfer section. Under that section, technically the trustee avoids the grant of the security interest, i.e., the transfer made within the preference period. 11 U.S.C. § 547 (1979). The terminology used in § 522(f) is consistent in concept with other provisions of the Code.

The terminology used by the Congress is understood by the authors of Collier on Bankruptcy, 15th Edition, as allowing debtor the power to avoid nonpossessory, nonpurchase money security interest in household goods.

In volume 3, Collier, supra, the following appears at p. 522:

> ¶522.29. Judicial Liens and Liens in Certain Property. § 522(c), (f).

[1]--Generally.

Whereas section 522(c) allows the protection of the debtor's exemption in property which was subject to a lien voided by the trustee, subsection (f) allows the debtor to avoid the fixing of certain liens to the extent that such a lien impairs an exemption. When a lien is voided pursuant to the trustee's avoiding powers, the lien remains void after deducting the value of the exemption protected under section 522(c), even though the value of the property that is exempted is less than the total value to which the lien is attached. When the debtor avoids the fixing of a lien, pursuant to section 522(f), however, the lien is avoided only to the extent of the exemption, and the value of the lien that exceeds the amount that is exempted may still be enforced by the creditor.

The liens that the debtor may avoid pursuant to subsection (f) include judicial liens, and non-possessory, nonpurchase-money security interests in property that is allowed an exemption under sections 522(d)(3), (4), (6) and (9). Even if the debtor chooses the state exemptions, this avoiding power applies, but only to property that is exempt under state law that is of the same kind as the property allowed under those four paragraphs of section 522(d). . . Nonpossessory, nonpurchase-money security interests in the following may be voided: household furnishing, household

> goods . . . Though the property on which liens that may be avoided is the same as several of the exemptions allowed by the Code, a debtor who claims the state exemption may avoid a lien in such property to the extent that such an exemption is allowed by the state. Subsection (f) grants this avoiding power with regard to any exemption allowed under subsection (b) including the state option. The avoiding power of subsection (f) is independent of any exemption. In addition, if a state opts out of the federal exemption, it does not affect the debtor's power under subsection (f).

The terminology used by the Congress apparently is understood by Commerce Clearing House, Inc. In 1978 the company published the Bankruptcy Reform Act of 1978 in its entirety and "a CCH explanation of its provisions. . ."

On page 43 appears an explanation of § 522(f) as follows:

> The debtor's exemptions are protected since a waiver of exemptions or of his avoiding powers is unenforceable in a bankruptcy case. Further protection is afforded the debtor by permitting him to avoid certain liens on exempt property. He may avoid a judicial lien on any

property if that property could have been exempted absent the lien. Similarly, he may avoid a nonpurchase money security interest in certain household and personal goods.

The terminology used by the Congress apparently is understood by the authors of A Practical Guide to the Bankruptcy Reform Act by Harvey R. Miller and Michael L. Cook (1979). At page 191 appears the following:

> Certain Liens on Exempt Property Invalid. Section 522(f) gives the debtor the right to avoid ". . .any nonpurchase money security interest in certain exempt property such as household goods." Specif - ically, an individual debtor can use Section 522(f)(2) to protect from nonpossessory, nonpurchase money interests "household furnishings, household goods, wearing apparel, appliances, books, animals . . . or jewelry that are held primarily for the personal, family, or house- hold use of the debtor or a depen- dent," as well as professionally prescribed health aids and implements used in his business. The ability to avoid nonpurchase money security interests will afford significant relief to the consumer debtor. "Frequently, creditors lending money to a consumer debtor take a security interest in all of the debtor's

> belongings, and obtain waiver by the debtor of his exemptions. . . . If the debtor encounters financial difficulty, creditors often use threats of repossession of all the debtor's household goods as a means of obtaining payment." Although such household goods have little, if any, resale value, as long as they are in the debtor's hands they retain a significant value to the consumer creditor--"they provide a credible basis for the threat, because the replacement costs of goods are generally high. Thus, creditors rarely repossess, and debtors. . . are coerced into payments they simply cannot afford to make."

The terminology used by the Congress apparently is understood by the author of Adjustment of Debts of an Individual with Regular Income, Chapter 13, Title I, Federal Bankruptcy Act by Walter Ray Phillips, Assistant Dean of the University of Georgia Law School comments at page 60 on § 522(f) of the Code as follows:

> Subsection (f) protects the debtor's exemptions, his discharge, and thus his fresh start by permitting him to avoid . . . a nonpurchase-money security interest in specified household and personal goods. The avoiding power is independent of any

waiver of exemptions. It is important to note that the debtor may likewise avoid the nonpossessory security interest in each of the subsection classifications.

The wisdom of § 522(f) may be of concern to a distinguished attorney who represents creditors and is the author of the following book. The terminology, however, gives him no doubt about what Congress meant.

In his new book, Creditors and the New Bankruptcy Code, Second Edition 1980, William R. Mapother, devotes much space to § 522 of the Code commencing at page 66:

> "Since most consumers have mortgaged most if not all of their property, the exemption laws help them very little. What good is it for a debtor to have a $1,200 exemption on a car if his car is fully mortgaged? If the car is worth $5,000 and the car loan balance is $5,000, there is no equity, so the exemption is meaningless to him. The debtor will have to pay the full amount of the loan or face repossession. When the debtor files a bankruptcy petition, he is often confronted with his secured creditors or losing his mortgaged property.

The drafters of the new Code were well aware that consumer exemptions looked good on paper but had little practical significance. So the drafters decided to provide a special category of super exemption. By this I mean an exemption that even overrides a mortgage and enables a lien to be extinguished by the bankruptcy. Under § 522(f), the debtor will be able to avoid (wipe out) liens on certain property to the extent that such lien impairs his exemptions. The super exemptions wipe out the following two categories of liens:

1. A judicial lien, [. . . omitted as not relevant to this decision].

2. A nonpossessory, nonpurchase money-security interest in exempt household furnishings, household goods, wearing apparel, appliances, books, animals, crops, musical instruments, or jewelry that are held primarily for personal, family or household use, and also implements, professional books, tools of the trade or professionally prescribed health aids. This means that if the loan is secured by household goods already owned by the debtor at the time of the loan, the security interest can be avoided by the debtor.

Several points should be stressed in regard to this category of super exemptions. First of all, a purchase-money security interest is not avoidable by the debtor and is treated like any other security

interest . . .

Most commentators acknowledge that this super exemption was primarily aimed at finance companies, because they often will take a security interest in household goods. The household goods often have a low resale value but a high replacement value, and finance companies have been able to obtain reaffirmations of the full balance on many of their bankrupt accounts. To reduce and discourage these reaffirmations, Congress decided to invalidate the typical consumer security interest in household goods on a nonpurchase-money loan. What the consumer lender must remember in making such a loan is that the lien will not stand up in bankruptcy court. As far as bankruptcy is concerned, a nonpurchase-money loan collateralized by a security interest in exempt household goods is nothing more than a signature loan.

* * *

Note that the distinction between purchase-money and nonpurchase-money only applies to household goods, household furnishings, etc. It does not apply to cars, boats, mobile homes, or real estate.

Both the federal exemptions in § 522(d) and the super exemptions in § 522(f) apply in Chapter 13 proceedings. The practical implication of this in a Chapter 13 case is that a creditor with a nonpurchase-money

security interest in exempt household goods will not be treated as a secured creditor.

The super exemptions are super in their ability to override liens, but they are also in another respect. The provision permitting state legislatures to override the federal exemptions does not apply to the super exemptions. In other words, the right of the debtor to override the two types of liens set forth in § 522(f) cannot be overridden by state legislative action. But the two types of super exemptions only exist to the extent that the property subject to the two types of liens is exempt, and the dollar amount of exemption in each category can be set by state legislative action.

This means, for example, that a state cannot override the right of a debtor to avoid a judicial lien, but his avoidance is only to the extent that property covered by the judicial lien is exempt. Since the residence exemption under the Code is $7,500, the debtor can avoid a judicial lien up to $7,500 worth of equity in his residence. If a state legislature overrides the federal residence exemption and reduces the dollar amount of the exemption to $4,000, then the debtor could only avoid the judicial lien up to $4,000 worth of equity.

If a state legislature were to adopt, for example, a household goods exemption of $1,000 rather than a per-item exemption of $200, then a

debtor could only avoid a nonpurchase-money security interest in $1,000 worth of his household goods. Being able to exempt a total of $1,000 in household goods is a far cry in most cases from being able to exempt an unlimited number of household items under $200 per item. Setting a dollar value of $1,000 or $2,000 on the total household goods owned by a debtor would be fairer to creditors, as it would eliminate some of the extreme prebankruptcy planning encouraged by the Code.

In short, while the two super exemptions in § 522(f) cannot be modified, the amount of property to which the super exemptions apply can be modified by a state legislature wishing to invalidate the federal exemptions in § 522(d) and adopting lower dollar amounts."

The terminology used by the Congress apparently is understood by one Judge of the Bankruptcy Court for the Eastern District of Tennessee. He recently discussed the question of avoiding a security interest at the Southeastern Bankruptcy Law Institute in Atlanta on March 18, 1981.

The subject of "Avoidance of Liens" was a part of the paper presented at the

Institute by the Honorable Clive Bare, Judge of the Bankruptcy Court for the Eastern District of Tennessee. In part Judge Bare said:

> "With respect to exempt property, the Bankruptcy Code gives the individual debtor certain rights that were not available to him under the prior Bankruptcy Act.
>
> * * *
>
> "Nonpossessory, Nonpurchase-Money Security Interests
>
> 1. Nonpossessory, nonpurchase-money security interests in household and certain personal property may be avoided by the debtor to the extent that the lien impairs an exemption to which the debtor is entitled. Sec. 522(f)(2).
>
> * * *
>
> 3. As enacted in subsection 522(f)

(2), liens may be avoided on--

a. household goods
b. household furnishings
c. wearing apparel
d. appliances
e. books
f. animals
g. crops
h. musical instruments
i. Jewelry
j. implements
k. professional books
l. tools of trade (of the debtor or a dependent of the debtor)
m. professionally prescribed health aids (of the debtor or a dependent of the debtor).

4. Under Sec. 522(f) a lien may be avoided "...on any property to the extent that the property could have been exempted in the absence of the lien." S. Rep. 95-989, 95th Cong. 2d Sess. 76; H.R. Rep. No. 95-595, 95th Cong. 1st Sess. 362.

* * *

7. There is no time limitation fixed in Sec. 522(f) for the avoidance

of liens. Local rules should be consulted, however. Frequently debtors are not aware that they have signed security agreements covering their household goods and may go through a bankruptcy case unaware that an avoidable lien is in fact held by a creditor. There appears to be no prohibition against the debtor asserting his rights under Sec. 522(f), even after the case has been closed.

8. Some decisions involving Sec. 522(f) are beginning to surface.

* * *

c. In re Hill, 6 BCD 307 (B.C. N.D. Ohio 1980), the court held that, even though a state (Ohio) had prohibited the use of federal bankruptcy exemptions

> under Sec. 522(d), it did not affect the debtor's power under Sec. 522(f) to avoid liens and security interests. The avoiding power of subsection (f) is independent of any exemption. "In addition, if a state opts out, it does not affect the debtor's power under subsection (f)." See Collier on Bankruptcy, Vol. 3 para. 522.29 (15th ed. 1980)."

From the above legislative history and commentary the court finds that § 522 of the Bankruptcy Reform Act of 1978 does provide for the avoiding of defendant's nonpossessory, nonpurchase money security interest in plaintiffs' household goods which were claimed as exempt.

While the consumer finance industry does not like § 522, it nevertheless

generally agrees with the court as to its meaning.

On April 3, 1981, this section of the Code was referred to by Professor Jonathan M. Landers, a consultant and spokesman for the creditor group. He said:

> The punitive provision which invalidates nonpurchase money security interests in furniture and household goods should be replaced by one which permits the consumer to retain the items by paying their reasonable value over a period of time.

Professor Landers and two other spokesmen appeared before the Subcommittee on Courts of the Senate Committee on Judiciary on April 3, 1981.

Pages 37 and 38 of their testimony contained the following:

> The purpose of the avoidance of nonpurchase money security interests in household goods and tools of the trade was to preserve property which is necessary to the debtor's "fresh start." That fresh start could be impaired if the debtor had to pay the full amount of the debt

> to retain goods which were necessary for minimal living standards, and which had a high replacement value.
>
> The present provision is a classic example of overkill. It assumes that if the security interest is valid, the debtor will lose the goods, finds that the consumer needs to keep them, and invalidates the security interest in toto to avoid such a result. Such a scheme creates a serious imbalance in the rights of debtors and creditors. Moreover, it effectively precludes consumers from making loans secured by such articles since the security interest will not be valid in bankruptcy. The result is either severe economic loss to the creditor or effectively depriving the consumer of his ability to pledge his property as security.
>
> The rights of debtors and creditors can be better balanced, and the objective of Congress enabling the debtor to retain property necessary for a fresh start still can be preserved. Rather than invalidating the security interest entirely, the debtor should be permitted to redeem the property over a five year period. . .

This testimony is quoted for the purpose of showing that the credit industry generally understands the avoiding power of § 522 and recognizes that its remedy lies with the Congress and not the

courts.

The defendant next argues that if the Code does provide for the avoidance of its lien then

> . . . the State of Tennessee has opted out of the Federal Exemptions under 11 U.S.C. § 522, and Tennessee Exemptions do not interfere with plaintiffs-debtors' exemptions. The portion of the property subject to the security interest is not exempt under Tennessee law.

In 1978, the Tennessee Legislature amended the Tennessee Code Annotated as follows:

> 26-2-112. Exemptions for the purpose of bankruptcy.--The personal property exemptions as provided for in this part, and the other exemptions as provided in other sections of the Tennessee Code Annotated for the citizens of Tennessee, are hereby declared adequate and the citizens of Tennessee, pursuant to section 522 (b)(1), are not authorized to claim as exempt the property described in the Bankruptcy Reform Act of 1978, 11 USC 522(d). [Acts 1980 (Adj. S.), ch. 919, § 4; T.C.A. § 26-901.]
>
> 26-2-102. Personal property selectively exempt from seizure.--

> Personal property to the aggregate value of four thousand dollars ($4,000) debtor's equity interest shall be exempt from execution, seizure or attachment in the hands or possession of any person who is a bona fide citizen permanently residing in Tennessee, and such person shall be entitled to this exemption without regard to his vocation or pursuit or to the ownership of his abode. Such person may select for exemption the items of the owned and possessed personal property, including money and funds on deposit with a bank or other financial institution, up to the aggregate value of four thousand dollars ($,000) debtor's equity interest. [Acts 1978 (Adj. S.), ch. 915, § 3; 1980 (Adj. S.), ch. 919, § 2; T.C.A. § 26-202.]

In this proceeding the total value of the household goods is less than $4,000. There is no question that the household goods could have been exempted in the absence of defendant's lien.

The defendant argues that while T.C.A. 26-2-102 allows a $4,000 exemption in personal property that it applies only to "debtor's equity interest," or to that portion of debtor's household goods not

subject to defendant's security interest.

As noted in In re Giles, supra,

> In the legislative history of § 522 (f), Congress specifically recognized that exemptions are allowed out of the debtor's equity. Both committee reports say that a debtor may avoid liens under § 522(f) to the extent the property could have been exempted in the absence of the lien. S.Rep.No. 95-989, 95th Cong., 2d Sess. 76 (1978); H.R.Rep.No. 95-595, 95th Cong., 1st Sess. 362 (1977). Thus, § 522(f) was meant to operate under the law as the Tennessee statute now specifically provides.
>
> If the Tennessee statute is applied as argued, the court doubts that it could stand. Probably it would be unconstitutional as applied in bankruptcy cases, because not within the state's power under § 522 (b) and in direct conflict with § 522(f). [citations omitted]. The constitutional question, however, is not before the court, has not been argued, and need not be answered. The court therefore makes no holding as to the constitutionality of the Tennessee statute.
>
> The court concludes that under §522(f) of the Bankruptcy Code and under the Tennessee statute, the debtors can avoid Barclays' security interest so that there will be equity up to the amount of the exemption that would be allowed in the absence of the security interest. In this case that means that the security interest is entirely avoided since

the total value of the collateral would be exemptable in the absence of the security interest.

An order will enter avoiding the security interest of defendant in plaintiffs household goods.

This memorandum constitutes findings of fact and conclusions of law. Bankruptcy Rule 752.

At Chattanooga, Tennessee.

BY THE COURT

/S/Ralph H. Kelley
United States Bankruptcy Judge

APPENDIX D

Constitutional and Statutory Provisions

11 U.S.C. § 522

(b) Notwithstanding section 541 of this title [11 USCS § 541], an individual debtor may exempt from property of the estate either-

(1) property that is specified under subsection (d) of this section, unless the State law that is applicable to the debtor under paragraph (2)(A) of this subsection specifically does not so authorize; or, in the alternative,

(2)(A) any property that is exempt under Federal law, other than subsection (d) of this section, or State or local law that is applicable on the date of the filing of the petition at the place in which the debtor's domicile has been located for the 180 days immediately preceding the date of the filing of

the petition, or for a longer portion of such 180-day period than in any other place; and

2(B) any interest in property in which the debtor had, immediately before the commencement of the case, an interest as a tenant by the entirety or joint tenant is exempt from process under applicable nonbankruptcy law. . . .

(d) The following property may be exempted under subsection (b)(1) of this section:

(1) The debtor's aggregate interest, not to exceed $7,500 in value, in real property or personal property that the debtor or a dependent of the debtor uses as a residence, in a cooperative that owns property that the debtor or a dependent of the debtor uses as a

residence, or in a burial plot for the debtor or a dependent of the debtor.

(2) The debtor's interest, not to exceed $1,200 in value, in one motor vehicle.

(3) The debtor's interest, not to exceed $200 in value in any particular item, in household furnishings, household goods, wearing apparel, appliances, books, animals, crops or musical instruments, that are held primarily for the personal, family, or household use of the debtor or a dependent of the debtor.

(4) The debtor's aggregate interest, not to exceed $500 in value, in jewelry held primarily for the personal, family, or household use of the debtor or a dependent of the debtor.

(5) The debtor's aggregate interest, not to exceed in value $400 plus any unused amount of the exemption provided under paragraph (1) of this subsection, in any property.

(6) The debtor's aggregate interest, not to exceed $750 in value, in any implements, professional books, or tools, of the trade of the debtor or the trade of a dependent of the debtor.

(7) Any unmatured life insurance contract owned by the debtor, other than a credit life insurance contract.

(8) The debtor's aggregate interest, not to exceed in value $4,000 less any amount of property of the estate transferred in the manner specified in section 542(d) of this title [11 USCS § 542(d)], in any accrued dividend or interest under, or loan

value of, any unmatured life insurance contract owned by the debtor under which the insured is the debtor or an individual of whom the debtor is a dependent.

(9) Professionally prescribed health aids for the debtor or a dependent of the debtor.

(10) The debtor's right to receive-

(A) a social security benefit, unemployment compensation, or a local public assistance benefit;

(B) a veterans' benefit;

(C) a disability, illness, or unemployment benefit;

(D) alimony, support, or separate maintenance, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor;

(E) a payment under a stock bonus,

pension, profitsharing, annuity, or similar plan or contract on account of illness, disability, death, age, or length of service, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor, unless-

(i) such plan or contract was established by or under the auspices of an insider that employed the debtor at the time the debtor's rights under such plan or contract arose;

(ii) such payment is on account of age or length of service; and

(iii) such plan or contract does not qualify under section 401(a), 403(a), 403(b), 408, or 409 of the Internal Revenue Code of 1954 (26 U.S.C. 401(a), 403(a),

403(b), 408, or 409) [26 USCS § 401(a), 403(a), (b), 408, or 409].

(11) The debtor's right to receive, or property that is traceable to-

(A) an award under a crime victim's reparation law;

(B) a payment on account of the wrongful death of an individual of whom the debtor was a dependent, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor;

(C) a payment under a life insurance contract that insured the life of an individual of whom the debtor was a dependent on the date of such individual's death, to the extent reasonably necessary for the support of the debtor and any dependent of the

debtor;

(D) a payment, not to exceed $7,500, on account of personal bodily injury, not including pain and suffering or compensation for actual pecuniary loss, of the debtor or an individual of whom the debtor is a dependent; or

(E) a payment in compensation of loss of future earnings of the debtor or an individual of whom the debtor is or was a dependent, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor. . . .

(f) Notwithstanding any waiver of exemptions, the debtor may avoid the fixing of a lien on an interest of the debtor in property to the extent that such lien

impairs an exemption to which the debtor would have been entitled under subsection (b) of this section, if such lien is-

(1) a judicial lien; or

(2) a nonpossessory, nonpurchase-money security interest in any-

(A) household furnishings, household goods, wearing apparel, appliances, books, animals, crops, musical instruments, or jewelry that are held primarily for the personal, family, or household use of the debtor or a dependent of the debtor;

(B) implements, professional books, or tools, of the trade of the debtor or the trade of a dependent of the debtor; or

(C) professionally prescribed health aids for the debtor or a dependent of the debtor. . . .

GA CODE ANN. § 51-1301.1

51-1301.1 Alternative Exemption.

[A]ny debtor . . . may exempt . . . for the purposes of bankruptcy . . .

(4) The debtor's interest, not to exceed $200 in value in any particular item, in household furnishings, household goods, wearing apparel, appliances . . . that are held for the personal, family, or household use of the debtor or a dependent of the debtor. The exemption of the debtor's interest in the items contained in this subsection shall not exceed $3,500 in total value; . . . .

TENN. CODE ANN. § 26-2-102

26-2-102. Personal property selectively exempt from seizure.

Personal property to the aggregate value of four thousand dollars ($4,000) debtor's equity interest shall be exempt from execution, seizure or attachment in the hands or possession of any person who is a bona fide citizen permanently

residing in Tennessee, and such person shall be entitled to this exemption without regard to his vocation or pursuit or to the ownership of his abode. Such person may select for exemption the items of the owned and possessed personal property, including money and funds on deposit with a bank or other financial institution, up to the aggregate value of four thousand dollars ($4,000) debtor's equity interest. [Acts 1978 (Adj. S.), ch. 915, § 3; 1980 (Adj. S.), ch. 919, § 2; T.C.A., § 26-202.]

TENN . CODE ANN . § 26-2-102
26-2-112. Exemptions for the purpose of bankruptcy:

The personal property exemptions as provided for in this part, and the other exemptions as provided in other sections of the Tennessee Code Annotated for the citizens of Tennessee, are hereby declared adequate and the citizens of Tennessee,

pursuant to section 522(b)(1), Public Law 95-598 known as the Bankruptcy Reform Act of 1978, Title 11 USC, section 522(b)(1), are not authorized to claim as exempt the property described in the Bankruptcy Reform Act of 1978, 11 USC 522(d). [Acts 1980 (Adj. S.,), ch. 919, § 4; T.C.A., § 26-901.]